

08 CV 02761

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

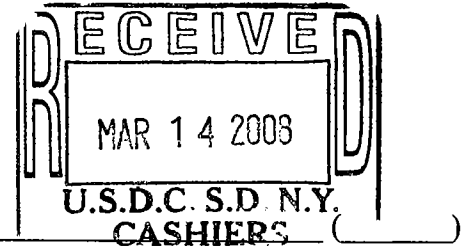
-----X
WEIGHT WATCHERS INTERNATIONAL,
INC.,
11 Madison Avenue
New York, New York 10010,

Plaintiff,

-against-

REBECCA COOPER,
23861 El Toro Road, Suite 700
Lake Forest, California 92630,

Defendant.
-----X



08 Civ.

**COMPLAINT FOR DECLARATORY
JUDGMENT**

Plaintiff Weight Watchers International, Inc., by and through its undersigned
counsel, and for its cause of action for declaratory judgment, states and alleges as follows:

THE PARTIES

1. Plaintiff Weight Watchers International, Inc. ("Weight Watchers International") is a corporation duly organized under the laws of the Commonwealth of Virginia with its principal place of business in the State of New York.

2. Upon information and belief, Defendant Rebecca Cooper ("Cooper") is an individual residing in the State of California.

JURISDICTION AND VENUE

3. This action arises under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. Jurisdiction is proper under 28 U.S.C. §§ 1331 and 1338 in that the claims arise under the laws of the United States.

4. Venue is proper in the Southern District of New York under 28 U.S.C. § 1391(b) because Defendant is subject to personal jurisdiction in this State and in this District. The acts giving rise to this action occurred at least in part in the Southern District of New York and Defendant has availed herself of the privilege of conducting business in this District.

5. Upon information and belief, Defendant is engaged in the regular, continuous and systematic transaction of business in New York and in this District.

BACKGROUND

6. Plaintiff Weight Watchers International was incorporated in Virginia in 1974, as a successor to the original Weight Watchers business founded in 1963. Its principal place of business is in New York, New York. Weight Watchers International is a leading global branded consumer company and the world's leading provider of weight-loss services, operating in over 25 countries around the world. Weight Watchers International's products and services help people lose weight and maintain their weight loss and, as a result, improve their health, enhance their lifestyles and build self-confidence. At the core of Weight Watchers International's business are weekly meetings, which promote weight loss through education and group support in conjunction with flexible, healthy food plans. Each week, approximately one and a half million members attend over 50,000 Weight Watchers meetings, which are run by over 15,000 classroom leaders.

7. Upon information and belief, Defendant Rebecca Cooper is an eating disorder therapist, and she sells books, DVDs, and related media in connection with her eating disorder programs.

8. Cooper was issued a registered service mark by the United States Patent and Trademark Office ("PTO") on June 11, 2002 for service mark "DIETS DON'T WORK," U.S.

Reg. No. 2577639, for use in connection with weight loss programs combining hypnosis with behavior changes to alter eating patterns.

9. The PTO cancelled the “DIETS DON’T WORK” registration on June 19, 2007.

10. On or about December 23, 2007, Weight Watchers International began an advertising campaign based on the theme and tagline “Weight Watchers. Stop Dieting. Start Living.” This campaign differentiates Weight Watchers from fad and quick fix diets because Weight Watchers fosters healthy lifestyle changes which are sustainable in the long term unlike quick fix, unsustainable solutions to weight loss. Some of the advertising materials include the following line of copy in the course of making statements about these fad and quick fix diets: “diets don’t work; Weight Watchers does.”

11. In a letter dated January 7, 2008, from counsel for Cooper to Weight Watchers International, Cooper asserted that Weight Watchers International’s advertising campaign “could constitute at least the following: trademark infringement[;] false designation of origin[;] deceptive trade practices; and unfair competition.” Cooper demanded that Weight Watchers International “immediately cease and desist using” the phrase “diets don’t work” in its advertising materials. Cooper also demanded that Weight Watchers International respond no more than seven days from receipt of the letter “to inform us in writing of your intention to comply with the demands” of the letter or Cooper “intends to proceed with any and all measures necessary and available to her under applicable Federal and State statutes.” A true and correct copy of this letter is appended hereto as Exhibit A and incorporated herein by reference.

12. In a letter dated January 15, 2008, to counsel for Cooper, counsel for Weight Watchers International notified Cooper that “its use of this sentence is lawful and will not be

discontinued.” A true and correct copy of this letter is appended hereto as Exhibit B and incorporated herein by reference.

13. In a letter dated March 3, 2008, from counsel for Cooper to counsel for Weight Watchers International, Cooper again demanded that Weight Watchers International “immediately cease and desist” from use of the phrase “diets don’t work.” Counsel for Cooper notified Weight Watchers International that Cooper had petitioned the PTO Trademark Trial and Appeal Board to set aside the proceedings which resulted in the PTO canceling the “DIETS DON’T WORK” mark. Counsel for Cooper further notified Weight Watchers International that on February 12, 2008, the Trademark Trial and Appeal Board restored Cooper’s registration and resumed the cancellation proceedings. The March 3, 2008 letter demanded that Weight Watchers International respond no more than seven days from receipt of the letter or Cooper “intends to proceed with any and all measures necessary and available to her under applicable Federal and State statutes.” A true and correct copy of this letter is appended hereto as Exhibit C and is incorporated herein by reference.

14. On March 4, 2008, counsel for Cooper sent an e-mail to counsel for Weight Watchers International. That e-mail made plain what Cooper had implied in the letters of January 15 and March 3, 2008: Cooper intended to sue Weight Watchers International if it did not discontinue the use of the phrase “diets don’t work” in its advertising. Specifically, the e-mail stated: “I will represent to you that my client [Ms. Cooper] has authorized me to provide an extension to file suit (if necessary) until March 13, 2008.” A true and correct copy of this e-mail is appended hereto as Exhibit D and is incorporated herein by reference. By subsequent e-mail, this date was extended until March 17, 2008.

15. Weight Watchers International denies that it has infringed upon Cooper's alleged trademark, or that the "Weight Watchers. Stop Dieting. Start Living." advertising campaign constitutes false designation of origin, deceptive trade practices or unfair competition. First, the declarative sentence, "diets don't work," cannot be a trademark. As even a simple Google search demonstrates, there are literally thousands of generic uses of this sentence. Appended hereto and incorporated herein by reference as Exhibits E, F, G, H and I are true and correct copies of examples of such generic uses. Even if the sentence could be a trademark, Weight Watchers International's use of the phrase "diets don't work; Weight Watchers does" merely describes Weight Watchers International's position in the advertisements; namely, quick fixes and fad diets do not work and are not sustainable in the long term, but Weight Watchers works because it teaches people how to incorporate healthy choices into their lives. The phrase appears in some of the advertisements in the campaign as one of many lines of copy which similarly communicate generic statements about dieting. Weight Watchers International's fleeting inclusion of the phrase in its advertisements does not indicate the origin of Weight Watchers International's services, nor does it suggest sponsorship, approval, affiliation, or association of Weight Watchers International with any other person or entity. Therefore, even if the phrase "diets don't work" constitutes a valid mark, there is no trademark use of "diets don't work" in Weight Watchers advertisements. Moreover, there is no likelihood that Weight Watchers International's use of the phrase "diets don't work" will create customer confusion.

16. As a result of Cooper's actions, Weight Watchers International has a reasonable belief that Cooper will commence litigation against Weight Watchers International claiming violations of the Lanham Act.

**COUNT I
FOR DECLARATORY RELIEF**

17. Paragraphs 1 through 16 are repeated and realleged as if fully set forth herein.

18. There is a substantial, continuing and justiciable controversy between Weight Watchers International and Cooper requiring a declaration and judicial determination that Weight Watchers International's use of the declarative phrase, "diets don't work," does not violate the Lanham Act.

**COUNT II
FOR DECLARATORY RELIEF**

19. Paragraphs 1 through 18 are repeated and realleged as if fully set forth herein.

20. There is a substantial, continuing and justiciable controversy between Weight Watchers International and Cooper requiring a declaration and judicial determination that the trademark registration for "DIETS DON'T WORK" is invalid and should be cancelled pursuant to 15 U.S.C. § 1119 because the term is generic and registration was obtained contrary to 15 U.S.C. § 1052.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in its favor, and against the Defendant, as follows:

1. For judgment declaring the legal rights and duties of the respective parties as set forth herein;
2. For a permanent injunction prohibiting Cooper from initiating litigation against and from threatening Weight Watchers International with litigation arising out of the conduct set forth herein;
3. For an order cancelling the trademark registration for "DIETS DON'T WORK;"

4. Awarding Weight Watchers its attorneys' fees and costs of this action; and
5. Awarding such other and further relief as the Court deems appropriate.

JURY DEMAND

Plaintiff Weight Watchers International, Inc. demands a trial by jury on all issues so triable.

DATED: March 14, 2008.

Respectfully submitted,



Terence P. Ross (TR-6045)

Of Counsel:
Sarah A. Wilson
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8500

Attorneys for Plaintiff Weight Watchers
International, Inc.

Exhibit A

SOUTHERN CALIFORNIA OFFICE
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FACSIMILE (949) 830-9405
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**NITSCHKE
&
VARRICCHIO LLP**
ATTORNEYS AT LAW

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TELEPHONE (415) 775-9400
FACSIMILE (415) 931-9405
NOCCAL@NYLAWGROUP.COM

*Writer's Direct Line: (949) 830-9402
Writer's Email: kurt@nylawgroup.com
Respond to Southern California Office*

January 7, 2008

VIA FEDERAL EXPRESS (TRK# 7983 4647 2075)

WEIGHT WATCHERS, INC.
11 Madison Avenue, 17th Floor
New York, New York 10010

Re: Service Mark - "Diets Don't Work"

Dear Sir or Madam:

We have the pleasure of serving as intellectual property counsel for Rebecca Cooper, owner of the trademark DIETS DON'T WORK in connection with weight loss programs. Ms. Cooper has been using this trademark in connection with her goods and services since at least 1998. It has come to our client's attention that you are running advertisements and marketing services using our client's mark for the same services covered by our client's prior and continued use of her trademark. For your convenience, I have enclosed a true and correct copy of a page from your website wherein a web-based commercial clearly uses the "DIETS DON'T WORK" mark. It has also come to our attention that a commercial recently aired on January 1, 2008 using the same "DIETS DON'T WORK" mark.

Your use of our client's trademark for identical goods and services is misleading customers, causing them to think that your mark is that of our client's or your services/products are sponsored by, endorsed by, licensed by, or otherwise affiliated with our client. Such use leads to confusion, mistake and deception among purchasers of our client's services. Your use of our client's trademark as described above could constitute at least the following:

- trademark infringement
- false designation of origin
- deceptive trade practices; and
- unfair competition

Further, it is clear under applicable statutes that a mark used by another would not have to be identical to the owner's mark in order to invoke infringement and/or violation of the LANHAM ACT. Any mark that would be confusingly similar would be sufficient for infringement with liability under the Act for damages attaching whether or not the infringing party has actual knowledge of the owner's mark. Willful infringement subjects the infringing

Weight Watchers
Re: Diets Don't Work
January 7, 2008
Page 2 of 2

party to actual damages plus attorney fees. (*See, e.g., E & J Gallo Winery v. Consorzio Del Gallo Nero* (1991) 782 F.Supp. 457.) Your actions, in our opinion, appear to be a willful infringement in an attempt to profit from use of our client's established mark.

Our client has expended significant resources to protect her intellectual properties including her valuable trademark. Ms. Cooper is the owner of several trademark applications and registrations in the U.S. for the mark DIETS DON'T WORK. In addition, Ms. Cooper has created, marketed and sold books, DVDs, compact discs and cassette tapes under the DIETS DON'T WORK mark since 1998. Ms. Cooper has also developed a structured eating disorder program and has provided services for said program since 1998. In short, Ms. Cooper has expended valuable resources building up goodwill and secondary meaning associated with the mark and considers the mark a valuable business asset.

Accordingly, you are hereby called upon to immediately cease and desist from your intentional and deliberate use of our client's mark, such use posing a clear and present danger of irreparably injuring the goodwill built up by our client as well as seriously impacting our client's business financially. This includes the **immediate cessation** of all advertisements making use of our client's mark, or any other mark confusingly similar thereto. Furthermore, you should be aware that any profits realized by you in connection with infringement of our client's mark may be included in tabulation of damages to my client.

In view of this intentional and deliberate infringement of our client's mark, this office has been instructed to allow you no more than seven (7) days from receipt of this letter to inform us in writing of your intention to comply with the demands herein. Otherwise, it will be assumed that you are deliberately continuing to make use of our client's mark in such a manner to intentionally confuse the public and damage our client. If such compliance is not timely forthcoming, our client intends to proceed with any and all measures necessary and available to her under applicable Federal and State statutes.

Very truly yours,

NITSCHKE & VARRICCHIO LLP

A handwritten signature in black ink, appearing to read 'Kurt M. Varricchio', with a long horizontal flourish extending to the right.

Kurt M. Varricchio

cc: Rebecca Cooper, Diets Don't Work

Enclosure



YOU COULD SEE YOURSELF
IN TIMES SQUARE! ➡

DIET

PEOPLE DON'T FAIL,
DIETS DO

DIETS ARE MEAN

MAKE THE
NEW YEAR'S
RESOLUTION
TO NOT GO
ON A DIET

Diets Don't Work

EAT PAPER
TO LOSE
WEIGHT

DIETS
TAKE AWAY THE
THINGS WE LOVE

all celery

THE DIET SECRET
TO END ALL
DIET SECRETS

IF DIETS WORK

LIVE OR DIET

JOIN THE CONVERSATION ➡

SEND AN E-CARD ➡

TAKE THE POLL ➡

Weight Watchers Meetings

Learn the program and get strategies for success from Leaders who have been there and other Weight Watchers meetings members.

[What are meetings?](#)

[What happens at a meeting?](#)

FREE REGISTRATION*

[Find a meeting](#) Enter zip code ➡

*In participating areas only. Pay only the weekly fee. Offer ends 3/8/08.

Meetings or online — which is right for you?

Weight Watchers Online

Follow our plan step-by-step online with interactive tools, helpful strategies, recipes and more.

[How does Weight Watchers Online work?](#)

[What you get](#)

[Weight Watchers Online for Men](#)

[Sign up today](#) ➡



Get FREE recipes, workout tips and more! Find it in our weekly email newsletter. ➡ Sign Up Now

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WEIGHT WATCHERS and POINTS are the registered trademarks of Weight Watchers International, Inc. and are used under license by WeightWatchers.com, Inc.

Exhibit B

GIBSON, DUNN & CRUTCHER LLP

LAWYERS

A REGISTERED LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

1050 Connecticut Avenue, N.W. Washington, D.C. 20036-5306

(202) 955-8500

www.gibsondunn.com

tross@gibsondunn.com

January 15, 2008

Direct Dial
(202) 955-8664

Fax No.
(202) 467-0539

Client No.
98418-00012

VIA FACSIMILE & OVERNIGHT MAIL

Kurt M. Varricchio, Esq.
Nitschke & Varricchio LLP
23861 El Toro Road
Suite 700
Lake Forest, CA 92630

Re: *Rebecca Cooper*

Dear Mr. Varricchio:

We represent Weight Watchers International, Inc. ("Weight Watchers or WWI"). This letter will respond to your letter of January 7, 2008 relating to WWI's recently launched advertising campaign. Please direct all future communications on this subject to me.

In your January 7th letter, you asserted that WWI's use of the simple declarative sentence, "diets don't work," infringed trademark rights allegedly held by your client, Rebecca Cooper. In addition, you requested that Weight Watchers cease and desist from the use of this sentence. Weight Watchers declines to do so because its use is entirely proper.

First, serious questions exist as to whether any trademark rights can arise out of the use of the phrase "diets don't work" in connection with a weight loss program. Even if so, a significant issue exists as to whether Ms. Cooper has any trademark rights at all in such phrase. In

GIBSON, DUNN & CRUTCHER LLP

Kurt M. Varricchio, Esq.
January 15, 2008
Page 2

particular, we note that Ms. Cooper's prior registration was cancelled¹ and that Mr. Walter P. Maksym, Jr. has asserted a claim of prior use.

Second, even if Ms. Cooper could establish any trademark rights, WWI's inclusion of the phrase "diets don't work" in its advertising campaign does not indicate the origin of WWI's services, nor does it suggest sponsorship, approval, affiliation, or association of Weight Watchers with any other person or entity. Rather, Weight Watchers is merely trying to convey to consumers that quick fixes and fad diets do not work and are not sustainable in the long term. Indeed, WWI's use of the phrase "diets don't work" is consistent with hundreds of other generic uses of the sentence that can be found through even a quick Google search. Such use is not actionable under federal or state law.

Third, there is no likelihood that the use of this phrase by Weight Watchers will cause confusion among consumers. Indeed, your January 7th letter fails to identify any actual confusion and provides no basis for concluding that confusion might be likely. As you are certainly aware, a use that does not cause confusion is not actionable under federal or state law.

Finally, I will note that the theme and tagline of WWI's new advertising campaign is "Weight Watchers. Stop Dieting. Start Living." The phrase, "diets don't work," appears only fleetingly in the online video you reference as one of many lines of copy. The trademark laws give no one the sort of monopoly over the English language you attempt to invoke here.

Given the foregoing, Weight Watchers has concluded that its use of this sentence is lawful and will not be discontinued.

Very truly yours,



Terence P. Ross

cc: Jeffrey Fiarman, Esq.
Terri Frank, Esq.

100368159_1.DOC

¹ In this regard, we note that Ms. Cooper is improperly asserting on her website that this sentence is a federally registered trademark. See www.rebeccashouse.org. <last visited January 14, 2008>. No such federal registration currently exists.

Exhibit C

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**NITSCHKE
 &
 VARRICCHIO LLP**
 ATTORNEYS AT LAW

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 SAN FRANCISCO, CALIFORNIA 94111
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 FACSIMILE (415) 931-9405
 NQCAL@NVLAWGROUP.COM

FACSIMILE TRANSMISSION

Date: March 3, 2008

Our File No.: 505.0003

To:

Name:	Fax Number:
Terrence Ross, Esq.	(202) 4670539

From: Kurt M. Varricchio, Esq.

Our Client: Rebecca Cooper

Re: *Diets Don't Work®*

TOTAL NUMBER OF PAGES (including this cover sheet): 10

(Please call (949) 830-9401 as soon as possible if any pages are missing.)

MESSAGE:

Please see correspondence dated March 3, 2008.

CONFIDENTIALITY STATEMENT

This communication is intended only for the person to whom it is addressed. It may contain information that is protected from disclosure to third persons under applicable law because it is confidential, an attorney-client communication, or attorney work product. If the reader of this message is not the intended recipient, you are hereby notified that you may be violating a legally protected confidential or privileged communication and that any review, dissemination, distribution, and/or copying of this communication or any portion of it is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the original message to us at the above address via the U.S. Postal Service. Thank you for your cooperation and consideration in this matter.

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*Writer's Direct Line: (949) 830-9402
 Writer's Email: burt@nylawgroup.com
 Respond to Southern California Office*

March 3, 2008

VIA FACSIMILE and US MAIL

Terence P. Ross
 GIBSON, DUNN & CRUTCHER LLP
 1050 Connecticut Avenue, N.W.
 Washington, D.C., 20036-5306

Re: Service Mark - "Diets Don't Work"
 Federal Reg. No.: 2577639
 State Reg. No.: 53930

Dear Mr. Ross:

We are in receipt of your correspondence dated January 15, 2008 regarding the above-referenced trademark. As expressed in our previous correspondence, we are intellectual property counsel for Rebecca Cooper, owner of the trademark DIETS DON'T WORK in connection with weight loss programs. Please accept this as our response to your correspondence and our second attempt to encourage your client to immediately cease and desist using the "Diets Don't Work" trademark in connection with its advertising and marketing campaigns.

First, in your correspondence, you asserted that no such federal registration currently exists for the mark "Diets Don't Work." Although you were correct in identifying that the mark was cancelled by the USPTO, you failed to realize that the mark was cancelled by way of a default judgment and that Ms. Cooper was in the process of seeking relief from said judgment. Ms. Cooper was successful in her pursuits as the TTAB set aside the Default Judgment and restored the Registration (No. 2577639) to Ms. Cooper on February 12, 2008. Accordingly, a federal registration of the above-referenced mark does exist and it is registered to our client. For your convenience, I have enclosed a copy of the TTAB's Ruling and Order.¹

Second, you assert that WWI's use of the mark does not suggest "approval, affiliation or association" with any other person or entity. You further assert that "there is no likelihood that the use of the phrase by (WWI) will cause confusion among consumers." Both of these

¹ Although Registration No. 2577639 appears on the USPTO's website as being "cancelled" as of the date of this letter, WWI should be advised that the USPTO has not yet updated their website and will modify and correct the status in due time.

Terence P. Ross, Esq.
Re: Diets Don't Work
March 3, 2008
Page 2 of 3

assertions are misguided. Ms. Cooper has, in fact, been approached by a number of clients inquiring as to whether or not Ms. Cooper has entered into an agreement with WWI. To wit, here are some of the comments that Ms. Cooper has received from inquisitive clients:

- "Did Weight Watchers buy your Diets Don't Work Program?"
- "Can I get the Diets Don't Work Program at Weight Watchers?"
- "Are you using the point system with the Diets Don't Work program now?"
- "I've seen your ad on TV."

Such comments and observations by the consuming public not only illustrate a likelihood of confusion, but also demonstrate *actual confusion* on the part of consumers. WWI's use of our client's trademark for identical goods and services constitutes, *inter alia*, trademark infringement, false designation of origin, deceptive trade practices, and unfair competition.

Third, you assert in your correspondence that the mark "appears only fleetingly" in WWI's advertising and marketing campaign. It is clear under applicable statutes that a mark used by another would not have to be identical to the owner's mark in order to invoke infringement and/or violation of the LANHAM ACT. As mentioned in my previous correspondence, any mark and/or use that would be confusingly similar would be sufficient for infringement with liability under the Act, irrespective of the degree of the use of the mark. Moreover, willful infringement subjects the infringing party to actual damages plus attorney fees. (See, e.g., *E & J Gallo Winery v. Consorzio Del Gallo Nero* (1991) 782 F.Supp. 457.) Given your client's knowledge of the registration, your client's actions appear to be a willful infringement in an attempt to profit from use of our client's established mark.

Finally, your insistence that our client seeks a "monopoly over the English language" is not only misguided, it is equally offensive. To reiterate from my previous correspondence, our client has expended significant resources to protect her intellectual properties including her valuable trademark. Ms. Cooper is the owner of several trademark applications and registrations in the U.S. for the mark DIETS DON'T WORK. In addition, Ms. Cooper has created, marketed and sold books, DVDs, compact discs and cassette tapes under the DIETS DON'T WORK mark since 1998. Ms. Cooper has also developed a structured eating disorder program and has provided services for said program since 1998. In short, Ms. Cooper has expended valuable resources building up goodwill and secondary meaning associated with the mark and considers the mark a valuable business asset.

WWI is hereby called upon to immediately cease and desist from its intentional and deliberate use of our client's mark, such use posing a clear and present danger of irreparably injuring the goodwill built up by our client as well as seriously impacting our client's business financially. This includes the immediate cessation of all advertisements making use of our client's mark, or any other mark confusingly similar thereto. Furthermore, you should be aware that any profits realized by WWI in connection with infringement of our client's mark may be included in tabulation of damages to my client.

Terence P. Ross, Esq.
Re: Diets Don't Work
March 3, 2008
Page 3 of 3

In view of WWI's continued, intentional and deliberate infringement of our client's mark, this office has been instructed to allow you no more than seven (7) days from the date of this letter to inform us in writing of WWI's intention to comply with the demands herein. Otherwise, it will be assumed that WWI is deliberately continuing to make use of our client's mark in such a manner to intentionally confuse the public and damage our client. If such compliance is not timely forthcoming, our client intends to proceed with any and all measures necessary and available to her under applicable Federal and State statutes. I encourage WWI to govern itself accordingly

Very truly yours,

NITSCHKE & VARRICCHIO LLP

A handwritten signature in black ink, appearing to read 'Kurt M. Varricchio', with a long horizontal flourish extending to the right.

Kurt M. Varricchio

cc: Rebecca Cooper, Diets Don't Work

Enclosures

kk

U. S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Walter P. Maksym, Jr.

v.

Rebecca Cooper

Cancellation No. 92046755

Walter P. Maksym, Jr., pro se.

Kurt M. Varricchio of Nitschke & Varricchio, LLP for Rebecca Cooper.

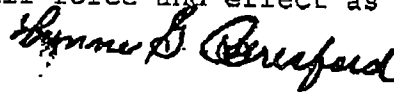
Whereas, on May 16, 2007 the Trademark Trial and Appeal Board entered judgment by default against respondent;

Whereas, on June 19, 2007, the Director cancelled respondent's Registration No. 2577639;

Whereas, on October 10, 2007, respondent filed a motion for relief from the final judgment;

Whereas, on February 12, 2008, the Trademark Trial and Appeal Board granted respondent's motion for relief from judgment.

Therefore, the June 19, 2007 order by the Director canceling respondent's registration is hereby set aside and Registration No. 2577639 is in full force and effect as of its original registration date.



Lynne G. Beresford
Commissioner for Trademarks

FEB 21 2008

RECEIVED
FEB 16 2008
UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: February 12, 2008

Cancellation No. 92046755

Walter P. Maksym, Jr.

v.

Rebecca Cooper

Linda Skoro, Interlocutory Attorney

The petition to cancel in this proceeding was filed on November 9, 2006, and was instituted on December 11, 2006. The Board was unable to find a serviceable address for respondent, and on February 12, 2007 proceedings were suspended pending service by publication in the Official Gazette. The notice of service by publication was published on March 13, 2007. Having received no response thereto, the registration was ordered cancelled on May 16, 2007 and was cancelled by Commissioner's Order on June 19, 2007.

This case now comes up on registrant's timely motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b).¹

¹ While registrant initially captioned her motion as one to set aside the default, because judgment has already been entered, registrant is actually seeking to have the judgment set aside. Petitioner pointed this out in his response to the motion, and in registrant's reply, the motion was brought into alignment with the rules.

Cancellation No. 92046755

Together with her reply to petitioner's objection to the motion, registrant submitted her affidavit and answer. In her affidavit, Ms. Cooper states that she relocated her business three and half years ago; that her former landlord did not forward any mail and she did not receive a copy of any of the filings in this proceeding, including the petition to cancel or the notice of cancellation; that she was unaware of the publication in the Official Gazette and learned of the status of her registration when she attempted to file her Section 8 affidavit; that on August 17, 2007 she learned that the registration had been cancelled and then obtained counsel.

Petitioner objects by contending that applicant has not provided any evidence of "mistake, inadvertence, surprise, or excusable neglect" as required by Fed. R. Civ. P. 60(b) to justify setting aside the default judgment.²

The determination of whether to grant relief from judgment under Fed. R. Civ. P. 60(b) is a matter largely within the discretion of the court, or in this instance, the Board, and such relief is granted only in exceptional circumstances. See *Case v. BASF Wyandotte*, 737 F.2d 1034, 222 USPQ 737 (Fed. Cir. 1984). Federal Rule 60(b)(1)

² Petitioner filed a response to registrant's reply and captioned it a motion to strike the reply. Petitioner's motion is actually a sur-reply and is improper and will be given no consideration. See Trademark Rule 2.127(e)(1).

Cancellation No. 92046755

provides that a court, in this case the Board, may relieve a party from a final judgment for "mistake, inadvertence, surprise, or excusable neglect".

Fed. R. Civ. P. 60(b) provides for relief from judgment in specified instances and requires that any motion for such relief be made within a "reasonable time", with a year maximum limitation on motions made pursuant to the first three grounds for relief (mistake, inadvertence, surprise, excusable neglect; newly discovered evidence; or fraud). This case, however, falls upon the sixth ground enunciated in Fed. R. Civ. P. 60(b), "any other reason justifying relief from the operation of the judgment", which is not constrained by the one year time period.

Among the factors to be considered in determining a Rule 60(b) motion to vacate a default judgment are the following: (1) whether the non-defaulting party will be prejudiced, (2) whether the default was willful, and (3) whether defendant has a meritorious defense. See *United Coin Meter Co. Inc. v. Seaboard Coastline Railroad*, 36 FR Serv2d 478, 705 F.2d 839 (6th Cir. 1983); and *Davis v. Musler*, 36 FR Serv2d 1370, 713 F.2d 907 (2nd Cir. 1983).

The circumstances outlined by respondent show that its failure to act in this case was not willful, but rather resulted from it never receiving notice of the proceeding. Based on the documents both parties have submitted in

Cancellation No. 92046755

support of their positions, respondent is clearly interested in maintaining its registration.

While petitioner vigorously³ complains of a reopening of this case, petitioner has not specifically alleged or demonstrated that it would be prejudiced by an order vacating the default judgment which resulted from respondent's failure to file an answer to the petition to cancel. Further, registrant has made a sufficiently persuasive argument that she has a meritorious defense, namely that she can defend her registration by showing that there is no likelihood of confusion between the parties' goods and services; that she has several equitable defenses to the proceeding; and that there has not been an abandonment of the mark.

In view of the totality of the circumstances in the proceedings and in the interest of seeking to have matters tried on their merits, the Board finds that registrant has established excusable neglect for her failure to timely file an answer or to respond to the notice of publication given

³ Petitioner is advised that the Board looks to the parties to behave in a spirit of cordiality and cooperation, particularly going forward into discovery. Additionally, the arguments surrounding service dates and receipt dates are viewed in light of the fact that all filings with the Board are available over the Internet and the parties are expected in their pursuit of due diligence to check the status of their cases. It does not appear that petitioner has provided an email address to enable it to receive copies of orders electronically. Petitioner is strongly encouraged to do so.

Cancellation No. 92046755

her relocation, that it was only four months since entry of the judgment and registrant has a meritorious defense.

In light of the foregoing, registrant's motion for relief from judgment is hereby granted and the Board's order entered May 16, 2007, entering default judgment, is hereby set aside.

Registration No. 2577639 will be restored to the register.

Accordingly, proceedings are resumed; registrant's answer is of record. Trial dates are reset as indicated below.

DISCOVERY PERIOD TO CLOSE:

August 12, 2008

30-day testimony period for party in position of plaintiff to close:

November 10, 2008

30-day testimony period for party in position of defendant to close:

January 9, 2009

15-day rebuttal testimony period for plaintiff to close:

February 23, 2009

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

Cancellation No. 92046755

.000.

NEWS FROM THE TTAB:

The USPTO published a notice of final rulemaking in the Federal Register on August 1, 2007, at 72 F.R. 42242. By this notice, various rules governing Trademark Trial and Appeal Board inter partes proceedings are amended. Certain amendments have an effective date of August 31, 2007, while most have an effective date of November 1, 2007. For further information, the parties are referred to a reprint of the final rule and a chart summarizing the affected rules, their changes, and effective dates, both viewable on the USPTO website via these web addresses:

<http://www.uspto.gov/web/offices/com/sol/notices/72fr42242.pdf>

http://www.uspto.gov/web/offices/com/sol/notices/72fr42242_FinalRuleChart.pdf

By one rule change effective August 31, 2007, the Board's standard protective order is made applicable to all TTAB inter partes cases, whether already pending or commenced on or after that date. However, as explained in the final rule and chart, this change will not affect any case in which any protective order has already been approved or imposed by the Board. Further, as explained in the final rule, parties are free to agree to a substitute protective order or to supplement or amend the standard order even after August 31, 2007, subject to Board approval. The standard protective order can be viewed using the following web address:

<http://www.uspto.gov/web/offices/dcom/ttab/tbmp/stdnagmnt.htm>

Exhibit D

From: Kurt Varricchio [mailto:kurt@nvlawgroup.com]

Sent: Tuesday, March 04, 2008 8:39 PM

To: Ross, Terence P.

Subject: Diets Don't Work

Mr. Ross:

Per our discussion earlier today regarding the *Diets Don't Work*® mark, I wanted to make contact via email. I will speak with my client regarding the terms of a possible Licensing Agreement. Unfortunately, I will be traveling for business Thursday and Friday, but I should have access to email and will be available via cell phone.

I will represent to you that my client has authorized me to provide an extension to file suit (if necessary) until March 13, 2008. Obviously, if both parties are engaged in fruitful negotiations and can reach a resolution, then both of our clients can avoid costly litigation. If you have an opportunity to speak with your client regarding what it would like in terms of a Licensing Agreement, please forward those thoughts to me and I will propose them to my client with the appropriate analysis.

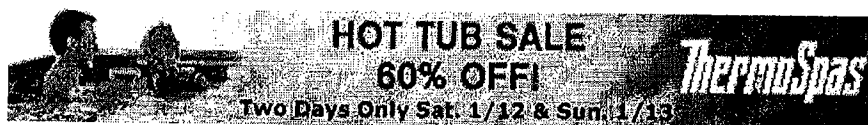
I appreciate your professionalism in this matter and look forward to reaching an amicable resolution. Until we speak again, take good care.

Kind Regards,
Kurt

Kurt M. Varricchio
NITSCHKE & VARRICCHIO LLP
23861 El Toro Road, Suite 700
Lake Forest, CA 92630
Phone: (949) 830-9400
Direct: (949) 830-9402
Fax: (949) 830-9405
www.nvlawgroup.com

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Exhibit E



ajc.com
The Atlanta Journal-Constitution

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Really... Diets don't Work?

By [Kelly Huggins](#) | Monday, April 23, 2007, 07:43 AM

The Atlanta Journal-Constitution

In the April edition of "American Psychologist," a new study published states that **diets just don't work for most people** (which is an understatement). This comes after just a week or two ago that Atkins is the "best of all diets" talk. So, what does this mean?

Well, simply as it says. Diets don't work. The reason is quite obvious. **You gain the weight back.** They also mention in the study **not only do you gain the weight back, but you gain more than what you lost.**

For years as a fitness consultant I always ask a prospective client the question, "Have you been on a diet?" Of course the answer I get is "Yes." Then I ask, "Did it work?" Then they will say, "Yes." Then I ask, "Well, if it worked, then why are you in my office looking to lose weight?" It is at that moment that light-bulb goes off in their brain. As they sit there for a moment they finally laugh and reply, "Well... I guess it really didn't, did it?"

I give you this illustration to point out that **weight loss from diets are temporary.** As you may have already learned, much of the "weight" loss is not even fat, but water and muscle.

Other big reasons diets don't work is that **they don't focus on changing behavior and lifestyle** (though they will claim they do). There is **no incorporation of a fitness plan** to improve metabolism and utilize excess calories. **Diets are too strict**, so you can't maintain them and **they don't focus on you** (the individual).

Bottom-line is, if you are a dieter, you need to **ditch the habit** (this is known as Yo-Yo dieting). If you're planning to go on a diet, don't do it. Save yourself from the heartache and frustration you feel when you gain it all back. Do the "right" things that you always hear about which is supportive nutrition, cardiovascular exercise, and weight training.

Have any thoughts on this subject? Go ahead and share.

[Permalink](#) | [Comments \(18\)](#) | [Post your comment](#) | Categories: [Health](#), [In The News](#), [Lifestyle](#), [Nutrition](#), [Weight Loss](#)

Comments

By julie

April 23, 2007 9:55 AM | [Link to this](#)

I disagree. Diets do work. You just have to stay on them forever.

By Dave

April 23, 2007 10:03 AM | [Link to this](#)

Publishing this kind of material will discourage people from even trying. If there is no hope then there is no choice for some but to die an early and painful death. Diets do work and stating that they do not just empowers the negative thinkers who are always interjecting the seed of doubt in a dieter. A friend of mine lost 40 lbs and was within 10 lbs of her ideal weight. She met someone at a party who told her that her diet (low carb) was going to kill her. She has gained back 15 lbs because of the doubt he injected into her thinking. Shame on him! Not having the extra weight and having the self-esteem that comes with success is a great reward.

By Warren

April 23, 2007 11:11 AM | [Link to this](#)

I think that Weight Watchers is a terrific weight loss plan, simply *because* it encourages all of the things you mention. It tries to develop a lifestyle of healthy eating (without being strict), activity, and then community support as well. I recommend it to all.

By Cletus Snow

April 23, 2007 11:13 AM | [Link to this](#)

I personally think you are full of beans. Five years ago my wife and I weighed a total of 510 pounds today she weighs around 135 and I weigh 210 we continue to watch what we eat and exercise. we lost every pound of the hazardous weight on the Atkins diet, I know many others who who have lost a considerable amount fat. Would you tell an alcoholic quitting doesn't work simply because he fell off the wagon a time or two hell no you wouldn't you should encourage him to try again. It seems that if every one was as encouraging as you guys we'd all be fat drunks.

By Kbear

April 23, 2007 11:22 AM | [Link to this](#)

Did y'all miss this statement???

Do the "right" things that you always here about which is supportive nutrition, cardiovascular exercise, and weight training.

He's completely right. Yo-yo dieting (which is what *most* people do) doesn't work. **You have to find the right balance of exercise and nutrition.** What he's saying is that solely dieting and expecting to do

it and then go back to the way you eat doesn't work. Its common sense.

By Michelle

April 23, 2007 11:30 AM | [Link to this](#)

I dropped 20 pounds doing Atkins and kept them off, because it didn't mess up my metabolism, also I get a lot of exercise.

By Ada

April 23, 2007 11:30 AM | [Link to this](#)

I think all Kelly meant was 'yo-yo dieting' meaning-restricting calories and exercising for a pre-determined amount of time, losing weight on that diet, then going right back to the way you used to eat...is a recipe for disaster. Let's re-phrase that to "Diets don't work, lifestyle changes do".

A diet will work, as long as you don't go right back to eating bad foods and not exercising. I lost 20 pounds of toxic fat in two weeks on the Master Cleanse detox program, and I continue to keep it off. My secret was adapting to the RAVE lifestyle program after the cleanse. No meat, no dairy lots of whole grains, fruits and veggies! My diet is WAY better than it used to be, and I exercise every day. Six months later, that 20 pound loss has turned into 25 pounds loss...with a lot of added muscle I must add!! I've never felt better in my life!

By LR

April 23, 2007 11:36 AM | [Link to this](#)

From another article, "[Dieting Most Often Fails in the Long Run](#)", they make the same point, but don't manage to be nearly so discouraging. It notes that while *dieting* may not be associated with long term weight loss, there are a number of strategies — as tracked by the National Weight Loss Registry — that **are** associated with long term weight loss/ weight maintenance:

— Eat breakfast daily. — Eat a moderately low-fat, high-carbohydrate diet. (sorry cletus!) — Keep track of progress through weigh-ins, food diaries. — Get LOTS of exercise — 60 to 90 minutes daily.

By Pam

April 23, 2007 11:43 AM | [Link to this](#)

Actually, I don't think anything is wrong with publishing this information. The truth is, the same people that would take this information and give up on their diet are the same people that would give up on anything. I've always been cautious of diets and no one can sway me one way or the other because I try to stay informed with everything that I do.

By des

April 23, 2007 11:44 AM | [Link to this](#)

That's what I love about the media. They say it and its so to the idiot masses.

By Charles

April 23, 2007 12:18 PM | [Link to this](#)

I'm often amused when I hear reports of African American women considering, "going on a diet." You tell me, if African American women will perm and put clownish colors in their hair, red, green, yellow, blond, etc., how much can any diet help, I pray you tell? The problem is located in a persons system of belief. You can carry that to the bank. Should any person decide to trade reality for fantasy, and many people have, there will be an outer and inner manifestation of that trade off.

Consider African American men and dieting. Here we have old men, young men, and boys sporting earrings etc. Obviously, they have traded reality for delusion. If over eating is the outer manifestation of the trade off, do you think dieting will help? Dieting definitely will not help. The problem is located in the head, illusion or delusion.

I am bringing you the story behind the story, the news behind the news. Hoping to convince you that reality is usually scoffed at and illusion is usually preferred, but in the battle to overcome obesity in this society, it will be reality and not illusion or delusion that will determine the outcome in this regard.

By NOT Charles

April 23, 2007 12:45 PM | [Link to this](#)

Charles, what does race and how you wear your hair have to do with this? You obviously want to attribute everything to race with no reason. You should always stick to the topic and not make it about race. African American women perm thier hair to make it more manageable. They can also die thier hair ANY color they want to, just like white women die thier hair. Perming hair has nothing to do with wanting to live up to Euro centric standards. Get your facts right. Also, men of ALL races wear earrings - Why should African American men be singled out for this?

By Charles

April 23, 2007 1:16 PM | [Link to this](#)

It's not about race my friend. It's about reality and diet. I have a lot of respect for Europeans and other groups; love their hair styles. Although, I would lose some respect for them if all of them in the office, both men and women, overnight or gradually, changed their hair styles to afros and locks. I would immediately think they had been deluded. Wouldn't you think so? Maybe your argument would be they have the right to wear fros etc. It's not about being Afrocentric.

By Jennifer A.

April 23, 2007 1:52 PM | [Link to this](#)

Thank you for the hair editorial, Charles. Now back to Kelly's comments. He's correctly pointing out that eating unrealistically for the sake of losing weight does not work. He's NOT saying a person can't lose weight. He'd be putting himself out of business if he believed that!

Healthy living takes more than limiting yourself to grapefruit at every meal for two weeks. Sure, you can lose weight on these "diets," but, for MOST people, the weight doesn't stay off. Because when

they're done, they get right back on that couch and get out the potato chips and onion dip. (I used to be a great example of this!) To be a person of a healthy size requires a lifestyle that unfortunately is not espoused by many Americans who'd rather watch TV and eat "food" manufactured in science labs than play in and enjoy food from the great outdoors. This healthy lifestyle includes eating mostly real foods and exercising regularly – for the rest of your life.

Thanks to Kelly, I am on the road to living this life. Every week, he's helping me build healthy muscle and rid myself of unhealthy fat. He has a training studio that I would highly recommend to anyone else who wants to do the same! Call him — 404.303.8305 — and check it out!

By Charles

April 23, 2007 2:11 PM | [Link to this](#)

Now, there you have it my friends. It's your choice. You can cast your lot with the apparent success of Jennifer A, or you can cast your lot with my so-called stated "hair editorial."

African Americans should seriously consider my so-called "hair editorial," and give great thanks to God for the apparent success of Kelly and Jennifer A.

By Still Defiant

April 23, 2007 3:41 PM | [Link to this](#)

Thanks Charles. You actually proved to me that there is a racist comment in EVERY single one of AJC's blogs. I thought this one was the last place I would hear someone's racist rants but you proved me incredibly wrong. Now on topic, I think that a lot of people focus on diets with the goal of losing weight and then returning to their regular lifestyles. I think that eating the right food and exercising regularly is still the best route.

By Charles

April 23, 2007 5:26 PM | [Link to this](#)

This is my last response for today. Let me try mental exploitation and I know that you will understand that language. You know, Still Defiant, you are right. Reality has nothing to do with diet. In fact, it's racist to consider reality in the first place when we are clearly talking about diet. There is no nexus to reality and diet. In fact, we can live in a fantasy world and be healthy.

People should be able to read Still Defiant's blogs and understand what contributes to the problems of the criminal justice system. Here is the irony. He accuses me of being a racist, now he does not have to think. People with similar dispositions do not have to think. Case solved, just declare racism. If I were to face the criminal justice system, I would prefer reasonable Europeans to sit as a jury of my peers. Go figure man.

By Laura Kay

April 25, 2007 10:59 AM | [Link to this](#)

Kelly, WOW!!! First it amazes me that people do not actually read what you wrote. Loosing weight is

not a quick fix which IS what most diets claim. As Jennifer and I are learning dieting doesn't work but changing your lifestyle and bad habits do. Secondly, why in the world did this turn into a race issue? In Charles first comment the one thing that stood out for me is about the person's belief system. He is correct. We all can buy into the quick fix solution because it is quick and easy and most do not want to work at getting healthier while loosing weight. Thirdly, Kelly, Jennifer says you are AWESOME. I am so happy she has you to assist her in her journey. Laura

Commenting is open from 8 a.m. to 5 p.m. M-F

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E-mail*:

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Link: [text to be linked](http://www.ajc.com) = text to be linked

Comments:

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http://www.ajc.com/blogs/content/shared-blogs/ajc/goodform/entries/2007/04/23/really_diets_dont_work.html

☐ Check the box to include the list of links referenced in the article.



Exhibit F

washingtonpost.com

This Just In: Most Diets Don't Work

By Sally Squires

Tuesday, January 4, 2005; Page HE01

Before you make a New Year's resolution to join an organized diet program, consider this: A University of Pennsylvania study finds a high cost per pound lost and very limited evidence for long-term success of any of nine popular diet programs studied.

Oh, yes, and large proportions of people -- sometimes more than half -- drop out within months of beginning the programs.

If you want to achieve a healthier weight, "the first step is to try to do this on your own," said Thomas A. Wadden, director of the Weight and Eating Disorders Program at Penn and co-author of the study, which appears in this week's *Annals of Internal Medicine*. "If that doesn't work, then get assistance."

Backed in part by a grant from the National Institutes of Health, Wadden and Penn physician Adam Gilden Tsai reviewed 1,500 weight loss studies of adults and zeroed in on 10 commercial or self-help programs.

Using those studies, plus additional data supplied by the programs themselves, the team examined nine plans: Weight Watchers, Jenny Craig, L.A. Weight Loss and eDiets.com; the self-help groups Take Off Pounds Sensibly (TOPS) and Overeaters Anonymous (OA); and three medically supervised commercial programs, Optifast, Health Management Resources and Medifast/Take Shape for Life.

"With the exception of one trial of Weight Watchers, the evidence to support the use of the major commercial and self-help weight loss programs is modest or nonexistent," the team concludes. "Controlled trials are needed to assess the efficacy and cost-effectiveness of these interventions."

Price is likely to put many of the programs beyond reach of those trying to achieve a healthy weight, the study found. The medically supervised programs, which also provided food, cost the most, ranging from \$840 to \$2,100 for three months, or "about \$50 per pound lost," Wadden said.

Jenny Craig cost \$1,249 for three months, including all daily food. Both Weight Watchers and L.A. Weight Loss cost about \$170 for three months, while eDiets.com was \$65, TOPS \$26 and OA had no charge.

While the study found little evidence to prove that most commercial or self-help weight loss programs work, here's what experts say can help you to achieve a healthier weight by doing it yourself in 2005:

Pace yourself. Sure, it's tempting to start changing all your habits at once, but Wadden and his colleagues have found that doing too much too soon can be a program for failure. In fact, behavioral

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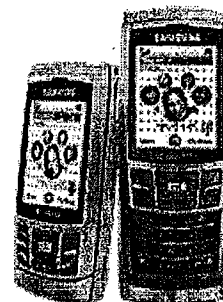


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studies suggest that new habits begun at the same time are also more likely to be abandoned at the same time. So it's best to spend the first two weeks getting some of your eating habits in order. "Then introduce exercise in the third or fourth week," Wadden said.

Keep records. Yes, you may feel like an accountant, but studies show that recording daily eating and exercise increases your chances of success. Susan Burke, vice president of nutrition services at eDiets.com, notes that participants who record the food they eat on their site fare much better with weight loss than those who sign up but fail to log on regularly. "Unless you use it, you're not going to lose it," she says.

Make big changes in small steps. To foster a sense of mastery over your new habits, begin with something you know you can do. Maybe you want to decrease calorie intake: Start with a level that isn't too onerous -- say, 1,800 calories per day this week, then drop to 1,600 daily next week and so on, until you reach the appropriate level for the weight loss you want to achieve.

Revel in your progress instead of obsessing about your long-term goal. "Focus on what you achieve," Wadden said. "So celebrate the 10 pounds lost, even if you need to lose 70 pounds. You can only feel miserable about the latter and, hopefully, somewhat proud of the former."

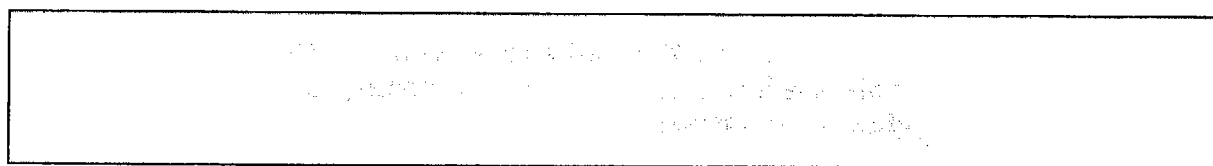
Be the turtle, not the hare. Plenty of weight loss programs and best-selling books promise quick success. But losing pounds too fast can raise the risk of gallstones, constipation, cold intolerance and hair loss. Plus, quick weight loss doesn't give you the chance to make the fundamental lifestyle changes necessary for long-term success. About half a pound to two pounds per week is considered a safe rate of weight loss. It takes a deficit of about 3,500 calories to lose a pound. But things don't always go according to plan: Hormonal fluctuations and water retention can sometimes slow the scale's decline even when you do everything right. One of the last contestants to be booted off "The Biggest Loser" reality television series lost two pounds in a week -- and she was working full time at losing weight.

Reward yourself. Most people forget to give themselves a good pat on the back for reaching an interim goal. Just make sure that reward isn't food. Think about renting a movie you've always wanted to see; go to a concert; buy a new CD; get a massage or new workout shoes or clothes.

Enlist support for your efforts. "Recognize that you need a supportive atmosphere to be successful with weight loss," said Karen Miller-Kovach, chief scientist for Weight Watchers. "So turn to co-workers, family or friends for help."

Share Your Tips or ask questions about healthy nutrition and activity when Sally Squires hosts the *Lean Plate Club* online chat, from 1 p.m. to 2 p.m. today, on www.washingtonpost.com. Can't join live? E-mail leanplateclub@washpost.com anytime. To learn more, and subscribe to our free e-newsletter, visit www.washingtonpost.com/leanplateclub.

Exhibit G


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GuardianUnlimited: Print version

Diets don't work in long term, says survey

2.30pm

Alok Jha, science correspondent

guardian.co.uk, Tuesday April 10 2007

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A waist reduction is the goal of many dieters. Photograph: Elizabeth Young/Getty

Diets are not a good way to lose weight in the long term, according to researchers. They found that, though dieters can lose significant amounts of weight in the first few months, most will return to their starting weight within five years.

"Diets do not lead to sustained weight loss or health benefits for the majority of people," said Traci Mann, a psychologist at the University of California, Los Angeles (UCLA). "You can initially lose 5 to 10% of your weight on any number of diets, but then the weight comes back.

"We found that the majority of people regained all the weight, plus more. Sustained weight loss was found only in a small minority of participants, while complete weight regain was found in the majority."

Prof Mann analysed 31 long-term studies that followed people on a range of diets for between two and five years. Her results, published in the April issue of the journal *American Psychologist*, concluded that most people would have been better off not dieting at all.

"Their weight would be pretty much the same, and their bodies would not suffer the wear and tear from losing weight and gaining it all back," she wrote.

Repeatedly losing and gaining weight has been linked, in previous studies, to cardiovascular disease, stroke, diabetes and altered immune function.

Prof Mann found that, though dieters typically lost up to 10% of their starting weight in the first six months, at least one-third to two-thirds of people on diets regained more weight than they lost within four or five years.

Among those who were followed for more than two years, 83% eventually put more weight back on than they had lost. One study showed that half of dieters weighed over 11 pounds more than their starting weight five years after the diet.

Another study examined a variety of lifestyle factors and their relationship to changes in weight in more than 19,000 healthy older men over a four-year period.

According to Janet Tomiyama, a psychologist at UCLA who also worked on the analysis, the study showed that "one of the best predictors of weight gain over the four years was having lost weight on a diet at some point during the years before the study started."

Judy More, spokeswoman for the British Dietetic Association, said that the results of the new study were not surprising. "When people are on a diet, people feel as if they are denying themselves things, so when they come off it, they think, 'Oh, thank God, I can go back to eating.'"

She added that people who wanted to lose weight should look at the challenge as a change in lifestyle. "They have to look at it not as a diet where they are denying themselves, because eventually people get sick of that and go back to their previous lifestyle.

"What they've got to think about moving towards is a new lifestyle, but doing it through small, sustainable changes. They've got to find a physical activity they enjoy, whether it's walking or going to the gym or taking up a new sport."

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Exhibit H



Article Link: <http://www.webmd.com/diet/news/20070411/diets-dont-work-long-term>



Diets Don't Work Long-Term

Most Who Go on Diets Gain Weight Back; Lifestyle Change Needed

By Daniel J. DeNoon
WebMD Medical News

Reviewed by Louise Chang, MD

April 11, 2007 – Most people who go on diets soon gain back any lost weight, a UCLA study suggests.

Traci Mann, PhD, associate professor of psychology at UCLA, was teaching a seminar on the psychology of eating when she noticed something odd about diet studies. Few of the studies followed up on dieters for more than six months. Even fewer followed dieters for a year or more.

Mann wondered what, in the long term, really happens when people go on diets. So she and her students tracked down 31 studies that, one way or another, had at least one year of follow-up data. They were interested in just one number: the percentage of dieters who, over time, gain back more weight than they lose.

"We found that the average percentage of people who gained back more weight than they lost on diets was 41%," Mann tells WebMD. "In each of the studies, a third to two-thirds of the subjects gained back more weight than they lost."

Does this mean that most of the people in the studies actually lost weight and kept it off? No, Mann says.

"This is actually bleaker than it seems – even though most people would find that 41% number to be pretty depressing," she says. "We have strong reasons to feel that this number underrepresents the true number of participants who gained back more weight than they lost."

Mann and colleagues report their findings in the April issue of *American Psychologist*.

Problems With Diet Studies

Diet studies, Mann and colleagues found, more often than not have one or more problems:

Most of the studies didn't actually weigh the dieters – they simply asked them about their weight. "If you ask people their weight, they are going to give you a lower number than their real weight. That is obvious to anyone who ever applied for a driver's license," Mann says.

In many of the studies, a substantial number of subjects dropped out of the study. "This isn't rocket science," Mann says. "A major reason people don't stay in touch with diet researchers is that they are embarrassed because they gained back the weight they had lost."

Diet isn't the only thing study subjects did to lose weight. Most studies included exercise regimens. So any weight loss could have been due to exercise and not to diet.

Many people in diet studies lost weight, gained it back, and went back on a diet before the end of the study. Such patients would be counted as having long-term weight loss when they simply lost weight only for a short period of time.

Why don't diets work? Mann says there are two issues. The first is that it's just plain hard for people to change their eating behaviors. And the second reason is that even if you do succeed at a diet, the rule of diminishing returns comes into play.

"When you keep to a reduced-calorie diet, your body makes metabolic adjustments that make it harder and harder for you to lose weight," Mann says. "Your body becomes very efficient, and you have to eat less and less to continue to lose weight. If you had the will to go on a diet, the fact that it steadily becomes less and less effective makes it even harder to stick to it."

Exhibit I

The Huffington Post



Robert Reames

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Face It, America: Diets Don't Work

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Once again, it's time to ponder those New Year's resolutions. "I'll get my finances together this year" and "going to spend more time with the family" and "Keep better contact with close friends." "I'm going to fix up the house this year." You or loved one may have these and/or other important resolutions that will become realistic goals and accomplishments for 2008. Then there's the big one, the granddaddy of all New Year's resolutions: "this year I'm going to lose the weight. I'm going to find the "diet" that works for me and I'm going to stick to it! I'm really going to make it happen this time." Momentum will be strong at the onset of the New Year. "I'm going to have the willpower this time and I'm not giving in."

Many folks all across America and abroad are having sincere thoughts of following through with the commitment to finally lose the weight, to finally be the most fit and healthy version of self. And though these thoughts are true and the desire is deep, the reality is that many and most of all Americans that go on that "diet" this year will fail. Not only will they fail, but at some point within the next three years they will have gained back most if not all weight lost....AND THEN SOME. The diet industry is approximately a 55 billion dollar industry with a 95% failure rate. Yep, read the numbers.

Think about it for a moment. Think of folks in your life past or present. Those that really are what you would consider fit, healthy and that have total control over their weight and their health. Are they on a diet? Were they ever on a diet? Or do they just live it? Perhaps at some point in their life they just laid down the gauntlet and said "Enough is enough" and changed their lives. Or....they've always just lived the lifestyle that supports a healthy weight. They eat, drink, sleep and walk the walk of optimum choices daily and throughout the course of their existence. Less than optimum choices are simply not a part of the plan. And then think about people in your life that have gone on diets. They've tried them all and are ever searching for the one that does the trick. Perhaps a day, a week or even months at a time they "stick to it" only to cave once the myth of willpower wears thin and fades away. How they struggle, how they're looking for the next fad and how they've wasted years of precious time, mental anguish and money on a pipe dream that the diet is finally going to give them the results they dream of. Then again they'll turn around and pump more money into the "diet" industry only to have yet another disappointment. And the diet industry loves the repeat business every year. Do you have picture in your mind of all the above? Are these pictures of friends, co-workers, loved ones? Or perhaps you yourself have been riding the rollercoaster?

Those that go through the "yo-yo" processes of losing the weight on any given "diet" only to gain it back again know exactly what I'm talking about. To see this factor in action just take a look at some of the celebrity magazines and websites on a month-to-month basis. You'll see this clearly at work. This yo-yo factor of extreme weight fluctuation can increase your chances of heart disease by 70%. And until you get your mind set on the absolute total commitment to be the optimum version of self--or what I call your "Personal Best"--FOR LIFE, your weight and your health will continue to spiral out of control. You'll be one year older at this time next year still looking for the magic bullet.

So what does it really take to succeed?

Change your perspective, raise your standards and ultimately change your life. Re-think how you see yourself in the arena of health and being the fittest, leanest version of yourself. It is that simple. That's how it's done. You must look at the choices you make on a daily basis in the areas of nutrition, exercise, sleep and stress management (Check out my post [The Big Four](#) from September) and ask yourself: "What are the consequences of my choices?" If you do this right you'll only have to do it once and you'll never have to re-visit this concept again. AND KNOW THAT YOU CAN ABSOLUTELY DO IT. Your daily choices will be automatic and you will have made the permanent changes and altered your perspective to be the healthiest version of you.

But the concept is one thing, your application of the concept of what it takes to be your best in health and at an ideal weight is yet another. For some this may be but a few small but permanent changes. For many it may take a complete 180 degree rotation. And know for sure that if you DO make the life commitment, if it really means enough to you, you'll do what it takes. That's worth repeating. It must mean something to you. If you're wondering why you haven't had success with your weight in the past, it's most likely because it simply doesn't mean enough to you. If it did, you would prioritize, take the action and make it happen. Whether it's 3, 10, 30, 50 or 300 lbs. you want to take off, and your mindset is everything here. You have to of come to a point in your life where you're absolutely 100% ready to make a commitment. No turning back. A major shift needs to take place for long term success. Ask yourself, "Do you truly want to take the weight off?"

Anyone can sustain the diet for a short period of time. It's those like I mentioned above that you know who live it. They're the folks succeeding in this arena of their life. Take yourself there and you'll be where you want to be. Two to twelve weeks of the latest fad will give you some short term results but will not permanently do the job. Just like holding the standards high for your job, your business, your relationships, your ability as a parent, as a friend or any commitment that you hold high; this has to be a standard you hold high and true to yourself. And if you do, you'll reap the benefits. In your job or career you take responsibility, meet deadlines and perform to a certain standard. You strive to continue to move up the ladder of success, have security and feel good about what you do. That's why you have the job or that successful business of your own. There are other areas as well in your life where you would absolutely not compromise a given standard that you have set for yourself. Add your health to this

list. You give 100% you'll get that back. You give 50%....25%....that will be your return. Your results are always a direct result of your efforts and action. You can't phone this one in and expect long term success. With permanent changes and unwavering commitment your process will be effortless and easy. You'll be on automatic. And keep in mind that "Commitment IS the magic bullet" here.

To begin, get the concept of the "diet" out of the picture. Most are temporary plans with temporary results. You may find a certain diet that can give you a good kick start. This can work and be okay. It can give you a start plan and some encouragement from the get go. It will get the ball rolling. But ultimately your long term answer is to incorporate what you already know. Weight control is not as much about food as much as it is your attachment to food. At any given time whether it's stress, food becoming your friend and counselor, or just "something to do," food becomes a quick pleasure that temporarily masks the pain or discomfort of a particular situation or time. Weight in many instances is a metaphor for life. You are what you eat. Keep in mind that the food that enters your system is ultimately the "fuel" that drives you, that runs your show. Every meal counts. So begin to create an environment in your life that supports the healthiest version of you; the ultimate version of self. Again your health, your weight and your waistline are all predominantly a result of your entire lifestyle. Does your lifestyle support that of an overweight 40 year old that rarely ever really "feels good"? or the vibrant, healthy, vivacious adult that you know you can be.

And our bodies were made and engineered for locomotion. We have a genetic predisposition for movement. Exercise and physical activity must play a role in your life and at every stage of life. If you sit for most of the day it's imperative that you get up and move either before, during, after work or at some point during all the above. And you don't have to be the elite athlete. Stay in your world on this one and do not compare yourself to someone that is totally not in your place. And a little insight here: even some folks you would consider avid gym goers don't always love going to the gym or grabbing a workout at home or work. But they'll stay consistent on this train because it's part of the plan. Again it's just automatic and wired in as part of the ongoing process. And honor your abilities, your current fitness level and be blessed that you have the physical body that God gave to you to be active. Incorporate your "Personal Best" here at activities that you enjoy. (or dislike the least!) Learn to make this the norm. And if you miss a workout....you'll make it up.

And get your rest. Folks think they can get by with 3, 4, 5 hours of sleep per night. You can't do it long term without consequences. Your body absolutely needs nightly rest and recovery. You cannot expect your body or your mind to be at peak levels if you are constantly sleep deprived. It will never happen. Rest your body. Shoot for 8-9 hours of sleep every night. Take a nap when you can. I fully realize that this is not possible to achieve every day in our fast paced and demanding world. My goal is to simply make you aware of it and just how important it is so you can put the concept to work. Studies confirm the link between sleep deprivation and weight gain. Just take note of how much less you crave sugars and starches on a good night's sleep. Lack of sleep and chronic high stress levels are linked to weight gain as well. Notice when you're not properly rested, your "fuse" is much smaller and your patience, your stress levels and ultimately your perception and your reactions to what goes on during the course of the day can be dramatically different.

Nearly 70% of adults in America are obese and or overweight. Can we make a significant improvement in these numbers? I believe we can. Centurions (people 100 years and older) are one of the fastest growing segments of the population. Truth is you may have yet another 40, 50, 60 even 70-75 more years on this planet. Question is, what are you going to do with these years? Are you going to be pro-active and possibly avoid or diminish the impact of health issues down the road? Or will you wait for a crisis to make you see the light and then play catch up?

Begin the year 2008 with a new lease on life. Go beyond the New Year's resolution. Make this a New Life resolution. What's stopping you? Take control of your destiny. It is that simple. But again I say the concept is one thing but your application of the concept is yet another. Your ultimate health awaits you. You, your family, friends and loved ones will all benefit from your efforts and the high standards for which you hold for your physical body; your health. Have a happy, prosperous 2008 and enjoy your success!

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